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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 471 and No. 473

ILLINOIS COMMERCE COMMISSION, ET AL., ETC.,
*Petitioners,*

*vs.*

BOARD OF TRADE OF THE CITY OF CHICAGO;
A CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF OF BOARD OF TRADE OF THE CITY OF CHICAGO, RESPONDENT.

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February 6, 1947.

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## BRIEF OF BOARD OF TRADE OF THE CITY OF CHICAGO, RESPONDENT.*

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## OPINION BELOW.

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The opinion of the District Court (Tr. 220) is not reported. The opinion of the Circuit Court of Appeals (Tr. 242) is reported in 156 F. (2d) 33.

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* We shall refer to Illinois Commerce Commission, *et al.*, Petitioners, No. 471, as "Commission"; to Daniel F. Rice & Co., *et al.*, No. 473, as "Rice"; to Board of Trade of the City of Chicago, Respondent, as "Board of Trade". The Commission's petition for writ of certiorari stands as its brief in this court and will be hereinafter referred to as "Com. Pet." The brief of Rice will be referred to as "Rice Br."

## Jurisdiction.

The District Court had jurisdiction because the right to relief depends on the construction or application of an Act of Congress (subdivision 1a, § 24 of the Judicial Code, 28 U. S. C. A. § 41 (1) (a)) and the suit arose under a law regulating interstate commerce (subdivision 8, § 24 of the Judicial Code, 28 U. S. C. A. § 41 (8)), the Commodity Exchange Act (7 U. S. C. § 1, *et seq.*) being involved. Petitioner invokes the jurisdiction of this Court under Section 240 of the Judicial Code as amended (28 U. S. C. 347).

## Question Involved.

The question involved is (a) whether the Commodity Exchange Act (7 U. S. C. A. 1-17a; Rice Br. pp. 31-52; Com. Pet., Appen. III) has completely superseded and rendered inoperative Section 194b* of the Illinois Grain Warehouse Act, as interpreted and applied by the Commission in this case, or (b) whether the relief which could be granted by the Commission on the complaint of Rice would necessarily be coextensive with or in conflict with the Commodity Exchange Act.

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* 194b. Rules of board of trade or grain exchange to be approved.] No rule or regulation of any board of trade or grain exchange which relates to the warehousing of grain in any public grain warehouse, or which relates to the custody of grain in any private warehouse, or the use or negotiation of custodian's receipts for such grain, shall be or become operative until such rule or regulation is approved by the Illinois Commerce Commission, and the Illinois Commerce Commission may adopt and promulgate reasonable rules and regulations consistent with the provisions of this Act for the purpose of making this Act effective (First enacted in 1927; Ill. Rev. Stat. 1945, Ch. 114, Sec. 194b)

## STATEMENT.

The respondent, Board of Trade, is a corporation created by legislative act of the Illinois State Legislature approved February 18, 1859 (Tr. 28-30). Its activities affect the flow of grain in interstate commerce, and the Congress of the United States has exercised its authority to regulate its activities by legislation commonly known as the Futures Trading Act (An Act of August 24, 1921, c. 86, 42 U. S. Stat. 187), the Grain Futures Act (Act of September 21, 1922, c. 369, 42 U. S. Stat. 998), and lastly the Commodity Exchange Act (Act of June 15, 1936, c. 545, 49 U. S. Stat. 1491, 7 U. S. C. 1-17a). It operates as a board of trade only by virtue of its designation as a contract market by the Secretary of Agriculture by virtue of his authority under the Commodity Exchange Act (Tr. 3).

The complaint filed by Rice before the Commission impleads the Board of Trade with the operators of 13 public warehouses, two of which are licensed by the State of Illinois and the remainder of which are licensed by the Secretary of Agriculture under the Federal Warehousing Act. The Rice complaint is aimed at public warehousing of grain: the 11 federal warehouses under the Federal Warehousing Act do not engage in private storage; the rules and regulations of the Board of Trade relating to private (sometimes called "custodian") warehousing of grain are not involved because it appears in the record that all of the custodian rules and regulations have been approved by the Illinois Commerce Commission (Rule 79g, Tr. 44; Regs. 1230-1242, Tr. 139-143). This is admitted in the Rice Br. p. 7.

Paragraph 15 of the Rice complaint (Tr. 17) directs

the attention of the Commission to the rules and regulations of the Board of Trade "*covering its maintenance as a commercial grain exchange,*"* and (under the prayer for relief, Tr. 19) asks the Commission to declare inoperative and void the rules and regulations which have not received the prior approval of the Illinois Commerce Commission and to require the Board of Trade "*to adopt and submit for approval,* rules and regulations which are fair, equitable, adequate and specific" as determined by the Illinois Commerce Commission. As we have alleged (Tr. 3), the Board of Trade exists as a commercial grain exchange only by virtue of its designation as a contract market by the Secretary of Agriculture under the authority of the Commodity Exchange Act. It cannot exist otherwise.

Initially, the Commission by assuming jurisdiction over the Board of Trade held that it had authority to veto rules and regulations of the Board covering its maintenance as a commercial grain exchange. Inasmuch as this arrogated jurisdiction was co-extensive with and undoubtedly conflicted with the provisions of the Commodity Exchange Act and with the regulations of the Secretary of Agriculture issued thereunder, the petitioners have abandoned such a broad claim. They now concede (Rice Br. p. 8-9; Com. Pet. pp. 28 *et seq.*) that the Commission under Section 194b may only approve or disapprove rules and regulations prepared and submitted to it by the Board of Trade "relating to the warehousing of grain". But they interpret the language of Section 194b (*i.e.* "No rule * * * which relates to the warehousing of grain") in such a fashion that the Commission will have and exercise authority over rules and regulations which do not relate to the warehousing of grain but, on the contrary, which relate to the satisfaction and execution of futures con-

*All italics ours unless otherwise stated.

tracts—a matter entirely covered by the Commodity Exchange Act.

The rules and regulations of the Board of Trade which Rice and the Commission here assert "relate to the warehousing of grain"—and which the Commission therefore may veto—(Rice Br. p. 6; Com. Pet. p. 28) do not essentially relate to the warehousing of grain. They establish conditions which must be met by a state or federal warehouseman if he wishes the warehouse receipts of his elevator to be tenderable in satisfaction of futures contracts, *i.e.* if he wishes his elevator to be "regular."

Rule 281 of the Board of Trade (Tr. 96) provides that warehouse receipts shall be usable for delivery in satisfaction of futures contracts when the warehouse issuing the same has been declared "regular"; the governing board is given authority by regulation to "prescribe the conditions upon which warehouses may be declared 'regular'." Pursuant to this authority the governing board enacted Regulations 1620-1636 (Tr. 155-158). The governing board prior to July first in each year "shall receive applications from persons operating grain warehouses who desire to have such warehouses made regular for delivery of grain . . ." (Reg. 1620) and the conditions precedent to a declaration of regularity are in part as follows:

1. The warehouse must be on water approachable by vessels of ordinary draft. (Reg. 1620.)
2. Connected by railroad with one or more of the eastern railway lines. (Reg. 1626.)
3. The proprietor or manager must be of unquestioned good financial standing or credit. (Reg. 1624.)
4. The proprietor must keep a system of registration of warehouse receipts and furnish information to the Registrar of the Board of Trade. (Reg. 1627.)
5. The warehouseman must furnish bond with sufficient securities to abide by these conditions. (Reg. 1621.)
6. If the warehouseman is a subsidiary corporation, its

obligations must be guaranteed by its parent corporation. (Reg. 1621A.)

7. The warehouse must be provided with modern improvements for expeditious handling of grain. (Reg. 1626.)
8. The warehouse must be open to inspection by committees of the Board of Trade. (Reg. 1632.)
9. The warehouseman must immediately advise the trade when grain stored therein goes out of condition, (Reg. 1628), and agree to certain procedures in the event of such damage to grain. (Rule 296, Tr. 104.)
10. Inasmuch as all futures trading would be disrupted should the rates of storage in the federal houses and state houses be substantially different, specific maximum charges for storage as a condition for regularity are laid down in Regulation 1620. Such charges are the maximum charges fixed by the Illinois statute. Should the State of Illinois fix rates of storage substantially differing from Regulation 1620, then the warehouses subject to Illinois control would automatically become not regular.
11. The warehouse must furnish live transit billing for reshipment or trans-shipment as provided in Regulation 1636. The issuance of bills of lading by the carriers is under the tutelage of the Interstate Commerce Commission.* Neither the Commission nor the Federal Warehousing Authority has issued any instructions or directives regarding the billing to be furnished to those who withdraw grain from federal or state warehouses. Should the Commission issue a directive requiring the Illinois warehouseman on the withdrawal of grain to submit billing different from the live transit billing required by Regulation 1636, then such state warehouses would no longer be regular. Should the Federal Warehousing Authority issue a directive with respect to billing, the federal warehousemen af-

* See *Board of Trade v. Olsen*, 262 U. S. 1, 33; *J. Rosenbaum Grain Co. v. C. R. I. & P. Ry. Co.*, 130 Fed. 46.

fected thereby would still be regular because of the paragraph just immediately following.

12. All federally licensed warehouses are authoritatively made regular by the Commodity Exchange Act. Section 5a(7) requires "that receipts under the United States Warehouse Act shall be accepted in satisfaction of any futures contract made on or subject to the rules of such contract market" without discrimination. The contract market is given authority, however, in the same section to make "reasonable requirements" "as to location, accessibility and suitability for warehousing and delivery purposes."

Assuming *arguendo* that the Commodity Exchange Act is a narrow act having to do only with futures trading, as petitioners contend, it is, nevertheless, a complete legislative regulation of futures trading on contract markets. Futures trading consists not only of the making of the futures contract in the pit but also the satisfaction of such futures contract by offset or delivery. Most deliveries are made by tender of warehouse receipts. The rules of the contract market with respect to deliveries are made a part of each futures contract by the Commodity Exchange Act and by the rules of the Board of Trade itself (Rule 16, Tr. 32). The Commodity Exchange Act is also made a part of the rules (Rule 603, Tr. 118; Reg. 1828, Tr. 180). No contract market can perform its duties under the Commodity Exchange Act (*e.g.* the prevention of manipulation and corners) unless it has a free hand under the Secretary of Agriculture to prescribe the conditions upon which the warehouse receipts of a warehouseman shall be usable to satisfy the delivery provisions of the futures contracts.

In this court for the first time Rice, not the Commission, contends that the Commission may have a small area of jurisdiction beyond the area of the Commodity Exchange Act, namely, jurisdiction to approve or disapprove rules and regulations of the Board relating to the *private* ware-

housing of grain (Rice Brief, p. 6). The Rice complaint does not concern private warehouses. No private warehouseman is a defendant as such. As a basis for relief, no mention is made in the Rice complaint of any specific rule or regulation of the Board of Trade relating to custodian (*i. e.*, private) houses. All regulations of the Board of Trade relating to the custodian (private) department have been approved by the Commission. (See Regulations 1230-1242, Tr. 139-143, Rule 79(g), Tr. 44; see also Rice Br. p. 7.) The custodian rules, as a matter of history, were adopted by the Board of Trade at the request of the bankers with the approval of the Commission in order that private warehouse receipts would be "eligible for rediscount under Federal Reserve Board requirements" (*idem*). Any private warehouseman who does not desire his receipts to have this extra validity need not comply with the custodian rules. It is purely voluntary. Assuming *arguendo* that the Commission has complete jurisdiction over such custodian rules and regulations, nevertheless such postulated jurisdiction is in no way involved in this case.

The Commission, for the State of Illinois, has stretched the language of Section 194b to enable itself to veto ordinances of the Board of Trade which relate to the "regularity" of warehouses and has thereby usurped power over the Board of Trade as a contract market. We respectfully submit that the conclusion of the Circuit Court of Appeals is correct (Tr. 261), 156 Fed. 2nd 33, 44:

> "It is plain, so we think, that any rule or regulation promulgated by the Board of Trade relative to its transactions in warehouse receipts must conform to and be consistent with the requirements of the federal authority in connection therewith. Any rule or regulation in conflict with or in excess of such authority would be invalid and this would be so whether or not it was approved by the Illinois Commission. It

is equally plain that any rule or regulation promulgated by the Commission concerning the same subject matter, which conflicted with or exceeded the power vested in the federal authority, would be of no effect. We therefore are of the view that Congress has invaded the precise field occupied by the Illinois Commission by reason of § 194 (b) of the Illinois Grain Warehouse Act and has rendered its authority inoperative."

## SUMMARY OF ARGUMENT.

The Index contains a paginated summary and outline of the argument.

## ARGUMENT.

### I.

### The Commodity Exchange Act Exclusively Occupies the Field of Regulation of Contract Markets and The Illinois Commerce Commission Is Therefore Without Power to Regulate the Board of Trade.

#### A. The Board of Trade and Warehousing.

The Board of Trade is, as said in *Board of Trade* v. *Olsen*, 262 U. S. 1, "the greatest grain market in the world." It is not a public utility under the Illinois Public Utilities Act. It is a place for doing business. No service charges are made. The only authority of the Commission over the Board of Trade is in Section 194b of the Illinois Grain Warehouse Act.

The Board of Trade, as a contract market, is necessarily concerned with the public warehousing of grain because the Commodity Exchange Act imposes certain duties upon contract markets with respect thereto; *e.g.*:

1. There must be sufficient warehousing facilities to warrant the maintenance of futures trading (sec. 5(a)) in an orderly, economic manner.

2. Contract markets must prevent manipulation of prices and corners (sec. 5(d)). This necessarily relates to cash and futures and the interrelationship of each with the other.

3. The receipts of federally licensed warehouses (all of which are public warehouses) must be made tenderable in satisfaction of futures contract without discrimination (sec. 5a(7) ),

4. Every futures contract contemplates fulfillment by delivery and acceptance of grain of federal grades and standards (sec. 5a(6)). Delivery of grain in sat-

isfaction of futures contracts during the last three business days of the delivery month may be made in car lots (Rule 282, Tr. 96), by bills of lading. But most deliveries are made by delivery of public warehouse receipts.

Obviously the contract market alone, under the Commodity Exchange Act and the rules and regulations promulgated by the Secretary of Agriculture, must determine what warehouses shall be "regular." Should the Commission be allowed to exercise its usurped authority to order a contract market to declare warehouses regular when they are not located on water, have no eastern railroad connections, are located at points far from the contract market, charge rates in excess of other "regular" houses, or are not equipped expeditiously to load and unload—should the Commission be allowed to exercise such authority, the contract market will be unable to perform the functions imposed upon it by federal authority. This conflict would inevitably result whether the authority of the Commission be an affirmative authority (to issue a directive, as contended for by Rice in his complaint), or whether it be a negative authority (to veto rules and regulations submitted to it by the Board, as Rice here contends).* The "regularity" of warehouses must be a matter for the exclusive determination of the contract market if it is to be held responsible for performance of the duties imposed on it by the Commodity Exchange Act.

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* In *First Iowa-Hydro-Electric Cooperative* v. *Federal Power Commission*, 66 Sup. Ct. 906, this Court said of a state law requiring a state permit prior to the construction of a project under the Federal Power Act:

> "Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government."

**B. The Commodity Exchange Act.**

The Commodity Exchange Act is not limited in its scope to the mere coverage of futures trading in the futures pit. Every futures contract is made subject to and contains all of the rules and regulations of the Board of Trade. Particularly important are those relating to delivery of grain in satisfaction of such contracts. Regulation of futures trading entails regulation of deliveries. It is impossible for the Federal Government to control futures trading unless it also controls the whole futures contract, not only the making of the contract, but the satisfaction of the contract. There can be no justifiable futures trading on a contract market where cash grain prices are manipulated, where the grain itself is cornered, or where there is wide divergency in the warehouse receipts which satisfy such contracts. Hence the Commodity Exchange Act imposes on contract markets the duty, under the Secretary of Agriculture, of preventing manipulation of prices, of preventing corners, and of unifying and standardizing deliverable warehouse receipts. The interference of any state authority in these fields would defeat the objectives of the Commodity Exchange Act. A review of the pertinent provisions of the Commodity Exchange Act demonstrates the soundness of this position:

Section 2 (a) defines "contract of sale" as including "sales, agreements of sale, and agreements to sell"; "commodity" as meaning wheat, cotton, rice, corn, oats, barley, rye, flaxseed, butter, eggs, etc.; "future delivery" shall not include any sale of any cash commodity for deferred shipment or delivery; "board of trade" includes any exchange "of persons who shall be engaged in the business of buying or selling any commodity or receiving the same

for sale on consignment"; "member of a contract market" shall mean and include individuals, etc. "owning or holding membership in, or admitted to membership representation on, a contract market or given members' trading privileges thereon."

Section 2 (b) provides that a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the commodity trade whereby commodities and commodity products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, etc.

Section 3 states that transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade are affected with a national public interest, etc.; that the transactions and prices of commodities on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodities and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodities.

Section 4 provides that trading in futures shall only occur by contract made by or through a member of a contract market designated by the Secretary of Agriculture as a contract market, evidenced by a record in writing showing the date, the parties and their addresses, the property, the price and the terms of delivery.

Section 4a. enables the Secretary to fix different trading limits for different commodities, markets, futures or delivery months, etc.

Section 4b. makes it unlawful for any member of a contract market in or in connection with any order to make, or the making of "(1) any contract of sale of any commodity in interstate commerce, or (2) any contract of sale of any commodity for future delivery" to cheat or defraud, make false report or statement, etc. This is not limited to futures contracts, but to the sale of any commodity in interstate commerce.

Section 4c. prohibits wash sales, cross trades, trading in indemnities, puts, calls, etc. and provides:- "Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities", etc. The foregoing (as well as the other provisions of the Act) shows the interrelation of cash transactions and futures trading.

Sections 4d., 4e. and 4f. concern trading in futures and the registration of futures commission merchants and floor brokers.

Section 4g. provides for suspension or revocation of the registration of a futures commission merchant or floor broker.

Section 4h. provides that it shall be unlawful for any person to make any contracts for the purchase or sale of any commodity for future delivery, etc. that are or may be used for hedging or determining the price basis or delivering any commodity sold, shipped, or received in interstate commerce for the fulfillment thereof, if such orders, etc. are executed or consummated otherwise than by or through a member of a contract market.

Section 4i. provides for the limitation of the amounts of futures that may be purchased or sold and covers records and reports of the transactions.

Section 5 is very important. It provides that the Sec-

retary of Agriculture is authorized and directed to designate any board of trade as a contract market when, and only when, such board complies with and carries out certain requirements, including (a) when located at a terminal market *where any cash commodity* of the kind specified in the contracts of sale of commodities for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity; (b) when the governing board thereof provides for the making and filing by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations prescribed by the Secretary of Agriculture *"showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consummated at, on, or in a board of trade, or transactions for future delivery,"* and when the governing board provides for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, "showing the details and terms *of all cash and future transactions* entered into by them, consummated at, on, or in a board of trade;" (c) when the governing board provides for the prevention of dissemination by the board or any member thereof, of false or misleading reports concerning crop or market information; (d) when the governing board thereof provides *for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board*; (e) when the governing board does not exclude a "co-operative association of producers having adequate financial responsibility *which is engaged in any cash commodity business.*"

Section 5a. is also important as far as this case is concerned, in that it provides that each contract market shall (1) promptly furnish the Secretary of Agriculture copies

of all *by-laws, rules, regulations* and resolutions made or issued by it *or by the governing board thereof or any committee, and all changes and proposed changes therein;* (2) allow inspection of all records; (3) require *"the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market, to make such reports, keep such records, and permit such warehouse visitation as the Secretary may prescribe;"* (4) provide for delivery during the delivery month after trading has ceased; (5) provide for the delivery notice; (6) require all futures contracts of sale to provide for the delivery in grades conforming to the U. S. standards; and (7) require that receipts issued under the United States Warehouse Act shall be accepted in satisfaction of any futures contract, without discrimination *"and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any State or enjoys other or different privileges than under State law."* There is a proviso to the clause that such receipts shall be for the kind, quality, and quantity of commodity specified and that the warehouse in which the commodity is stored shall meet "such reasonable requirements as may be imposed by such contract market on other warehouses as to location, accessibility, and suitability for warehousing and delivery purposes."

It clearly appears by these paragraphs (3, 6 and 7 of Section 5a.) that the Commodity Exchange Act makes the warehouses in the terminal market in which the contract market is located part of the machinery of the Board of Trade and that the Commodity Exchange Act has preempted the field as far as delivery of warehouse receipts for grain on futures contracts is concerned. The last clause specifically provides that the contract market must permit

without discrimination, United States Warehouse receipts, to satisfy futures contracts.

Section 5b. provides that the failure or refusal of any board of trade to comply with any of the provisions of this Act, or any of the rules or regulations of the Secretary of Agriculture thereunder, shall be cause for suspending or revoking the designation of the board as a contract market.

Section 6(a) provides for a Commission, consisting of the Secretary of Agriculture, Secretary of Commerce, and the Attorney General of the United States, authorized to suspend or revoke the designation of a board of trade as a contract market upon a showing that the board has failed or is failing to comply with any of the requirements as above set forth, or is not enforcing its rules of government as set forth in Section 5 above referred to.

Section 6a. requires that a board of trade shall not exclude from membership any cooperative association of producers engaged in cash commodity business having adequate financial responsibility, unless authorized by the Commodity Exchange Commission, etc.

Section 6b. provides that if any board of trade, or director, or officer, etc., is violating or has violated any of the provisions of the Act or any of the rules or regulations of the Secretary of Agriculture, etc., the Commission (designated under the Commodity Exchange Act, section 6(a) consisting of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General of the United States) may, in lieu of revoking the designation as a contract market, direct said board to cease and desist from such violations, and if such board, etc., shall fail or refuse to comply with the order, the guilty party may, upon conviction, be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor

more than one year, or both. This is a penalty that could be enforced against the Board of Trade and its members if the Board complied with improper orders of the Illinois Commerce Commission. It is unbelievable that Congress ever intended to permit a state to attempt to regulate a designated contract market when, by reason of such regulation, the contract market and its members might be subjected to criminal penalties.

Section 8 authorizes the collection of information "for the use of Congress," and provides for such investigations as the Secretary of Agriculture may deem necessary to ascertain the facts regarding the operations of boards of trade, and the Secretary may, upon his own initiative or in co-operation with existing governmental agencies, investigate marketing conditions of commodities and commodity products and byproducts, including supply and demand for these commodities, cost to consumer, and handling and transportation charges. Thus, under the Commodity Exchange Act, the Secretary of Agriculture not only licenses the contract market, but the Secretary of Agriculture is also directed to investigate marketing conditions in order to provide information for Congress for such use as it sees fit. The foregoing gives the Secretary of Agriculture, in so far as the Board of Trade is concerned, the opportunity to do what plaintiff requests the Illinois Commerce Commission to do (Tr. 18)—"institute an inquiry and investigation of the unjust, unreasonable and discriminatory rates and practices, the inadequate, improper, and unsafe services rendered."

Section 8a. authorizes the Secretary of Agriculture (5) to make rules and regulations to accomplish the purposes of the Act and (6) to publish the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary

disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers.

Section 9 provides severe penalties for violation of the provisions of Sections 4, 4a., 4b., 4c., 4e., 4h., and 4i. by members of the contract market.

**C. Regulations of the Secretary of Agriculture.**

In pursuance of the Act, the Secretary of Agriculture has issued regulations. These, so far as the Board of Trade and the Illinois Commerce Commission are concerned, have the force and effect of law. It becomes necessary therefore to analyze such regulations. These regulations are contained in Exhibit D attached to the complaint filed in the District Court (Tr. 207) and are contained in the Appendix to this brief.

In Section 1.3 a board of trade is defined as meaning "any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling any commodity or receiving the same for sale on assignment." This refers to cash grain as well as futures trading.

Other regulations refer to registration of futures commission merchants and floor brokers. (Sections 1.7 to 1.16.)

Sections 1.17 to 1.30 refer to reports of commission merchants and the handling of customers' funds. Section 1.35 requires the keeping of full and complete records of all commodity and futures transactions and cash commodity transactions made by and through the member on or subject to the rules of a board of trade.

Section 1.41 requires that each contract market shall promptly furnish to the Administration copies of all by-

laws, rules, regulations and resolutions, as authorized by Section 5a (1) of the Commodity Exchange Act.

Section 1.43 of the regulations directs that each contract market shall file with the Food Distribution Administration of the United States Department of Agriculture a list of all warehouses (both state and federally licensed) in which or out of which commodities are deliverable in satisfaction of futures contracts made on or subject to the rules of such contract market, which list shall show the name, location, and storage capacity of each such warehouse, together with the name and the business address of the operator thereof, and such list shall be accompanied by a schedule of the storage charges, handling charges, and the annual fire insurance rate applicable to each such warehouse. The Administrator shall be kept concurrently advised of all changes affecting such information.

Section 1.44 requires each contract market to require the operators of warehouses whose receipts are deliverable in satisfaction of commodity futures contracts made on or subject to the rules of such contract market to keep records and (c) "to permit visitation of the premises and inspection of the books and records of such warehouses by duly authorized representatives of the United States Department of Agriculture or the Department of Justice." This regulation applies not only to Federally licensed warehouses, but to all warehouses made regular by the rules of the Board of Trade, including those warehouses licensed by the State. It shows that in so far as the Commodity Exchange Act is concerned the activities of such state licensed warehouses are under the visitorial scrutiny of the Secretary of Agriculture. Federal or state warehouses must, in order that grain stored therein may be deliverable in satisfaction of futures contracts, comply

with the provisions of Board of Trade rules required by this Section.

In pursuance of Section 1.44 the Board enacted Regulations 1627 and 1632 (Tr. 156-157; See also Rule 603, Tr. 118 and Regulation 1828, Tr. 180). Yet these are the regulations, according to Rice (Rice Br., p. 20) which must be submitted to the Commission for approval or disapproval. True, the Commission might approve them, but it is also true that the Commission might disapprove them. This obvious conflict demonstrates, we submit, that the Board of Trade should not be subjected to the authority of the Commission in respect of its regulations concerning the regularity of warehouses.

Section 1.45 requires the delivery of commodities under futures contracts to conform to United States standards.

The foregoing orders of the Secretary of Agriculture, as well as the Commodity Exchange Act itself, demonstrate that futures trading cannot be regulated without a synchronous regulation of deliveries. Warehouse receipts of federal warehouses must be authorized by contract markets for delivery. But whether warehouse receipts issued by state warehouses shall or shall not be accepted as satisfaction of futures contracts is a matter over which the Commission is given no control by Sec. 194b; and, if it usurps such control—as it here seeks to do—it must be restrained by the federal courts in order that contract markets may be able to fulfill the duties imposed upon them by the Commodity Exchange Act and the directives of the Secretary.

**D. Reference to State Law in the Commodity Exchange Act.**

By specifically reserving state jurisdiction over two matters covered in the Commodity Exchange Act, Congress has shown a legislative intent that there shall be no state

jurisdiction over the other matters covered in the Commodity Exchange Act.

Section 4b of the Commodity Exchange Act declares it unlawful for any member of a contract market to use the contract market to cheat or defraud; to make wilful false statements; to deceive or attempt to deceive in regard to any order or contract; or to bucket an order. Section 4c prohibits wash sales, cross trades, accommodation trades, fictitious sales, and prohibits dealings in "privileges"; and also prohibits transactions to be used to cause any fictitious prices to be reported. Section 4c contains the following provision to permit additional state regulation in respect to these two matters:

> "Nothing in this section or in Section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections."

These sections emphasize that Congress has taken complete control of the contract market in all other respects. The prohibition of state action in other respects is to be inferred when Congress states that state action may take place in these particular respects. It is said in 50 Am. Jur. 455, Statutes, Section 434:

> "§ 434.—Effect of express exceptions.—The specification by the legislature of exceptions to the operation of a general statute does not necessarily operate to preclude the court from applying other exceptions. However, where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and *excludes all other exceptions or the enlargement of exceptions made.* Under this principle, where a general rule has been estab-

lished by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication. In this respect, it has been declared that the courts will not enter the legislative field and add to exceptions prescribed by statute."*

Also supporting our view is the language of this court in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 66 Sup. Ct. 906, where it is said:

"Section 27 expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides:

" 'Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.' 41 Stat. 1077, 16 U. S. C. § 821.

"Section 27 thus evidences the recognition by Congress of the need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome. * * *

* * * * * *

"This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course."

* "It is well settled that an exception in a statute * * * excludes all other exceptions." 25 R. C. L. 983. "Provisos are construed as affecting the paragraph to which they are annexed." *Spring* v. *Olney*, 78 Ill. 101, 105; *Bass* v. *B. & O. T. R. Co.*, 142 F. (2d) 776, 778. "No further exceptions may be read into the act." *People* v. *Deep Rock Oil Co.*, 343 Ill. 388, 401.

If Congress had intended to "save" to the State its regulatory powers other than those indicated in Sections 4(b) and 4(c), it would have had to have a saving clause such as is to be found in Section 3 of the Act of March 3, 1927, 44 stat. 1355, 7 U. S. C. § 496 (relating to dumping of farm products) as follows:

> "§ 496. *Validity of other statutes dealing with same subject.* This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this chapter, but it is intended that all such statutes shall remain in full force and effect, except in so far only as they are inconsistent herewith or repugnant hereto. Mar. 3, 1927, c. 309, § 3, 44 Stat. 1355."

See, also, the saving clause in the Act of April 29, 1878, 20 Stat. 37, quoted in *Morgan* v. *Louisiana*, 118 U. S. 455, where (465) it was provided that "there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws."

**E. Cooperation Between State and Federal Authorities.**

The only other reference to state authority is found in Section 12, which reads as follows:

> "Sec. 12. The Secretary of Agriculture may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, *or any person;* and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere,

and there are hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose."

By no manner of reasoning can it be said that this section surrenders any of the control of Congress over a contract market to any state or department, agency or political subdivision thereof or to "any person." The Secretary of Agriculture *may* cooperate with any department or agency of the Government or any state; but the state is not authorized to interfere with the Secretary of Agriculture or with the objectives of the Commodity Exchange Act.

There are many matters in which the Secretary of Agriculture may cooperate with state authorities to the advantage of both. The information collected by the Secretary of Agriculture under the Commodity Exchange Act might well be of importance to state regulatory bodies in one way or another. Again, state information concerning possible violations of the Commodity Exchange Act by exchanges, brokers, or commission houses, would be of importance to the Secretary. But this is far from saying that permission to the Secretary of Agriculture to cooperate with the states is an indication of intention that the states may likewise regulate contract markets or regulate deliveries on futures contracts.

The case most strongly relied upon by Rice and the *amicus curiae* is *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, where the State of Minnesota required all foreign corporations to have a certificate to transact business in the State and to pay a license fee. A North Dakota customhouse brokerage corporation conducted business in Minnesota without obtaining such certificate. As an excuse for not complying with the General Minnesota Foreign Corporations Law the customs house brokerage company asserted that it had obtained a license to conduct a custom

house brokerage business from the Secretary of the Treasury. This was held to be no excuse: there was no conflict between the General Minnesota Foreign Corporations Law and the Federal Custom House Brokerage Law. It was apparent from the Treasury regulations that a foreign custom house brokerage concern must be "authorized to do business in the state or states in which the other" custom house district is located. Whereupon the court used the language so frequently quoted by our opponents: "Where the Government has provided for collaboration the courts should not find conflict." The court said at page 211:

> "We have considered literally scores of cases in which the States have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances. To review them to any extent would be writing the history of the adjudicatory process in relation to the Commerce Clause."

We do not ask this court to find conflict in respect of matters in which cooperation has been commanded. The states specifically are given authority to legislate regarding wash sales and fictitious trades, etc., as above set forth. The Secretary of Agriculture is permitted to cooperate in the respects mentioned. But the Commission in this case is not cooperating with the Secretary. It is asserting authority which conflicts with the Commodity Exchange Act.

It is significant, we submit, that the "cooperation sec-

tion" of the Commodity Exchange Act above quoted does not contain a saving clause for concurrent state action. In the Perishable Agricultural Commodities Act and the Export Standards Act, federal authorities are permitted to cooperate with state authorities, but both acts contain the following clause:

> "* * * This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this chapter; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto." (7 U. S. C. 499o; 7 U. S. C. 587.)

Furthermore, the section provides that the Secretary of Agriculture may cooperate with any department of the government, any state, territory, "* * * *or any person.*" There cannot be any doubt that this clause does not give "any person" with whom the Secretary cooperates any supervisory or regulatory powers over contract markets.

**F. The Authorities—Since Congress Has Assumed Completely to Regulate and Control Contract Markets, State Regulation Is Superseded and Excluded.**

In the companion cases, *Illinois Commerce Commission* v. *Great Lakes Elevator Corporation*, Nos. 470 and 472, this point will be more fully covered.

In *Pennsylvania Railroad Company* v. *Public Service Commission*, 250 U. S. 566, it is said (569):

> "* * * when the United States has exercised its exclusive power over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them."

Again, in *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148, the Supreme Court in 1941 said (155-156):

> "Exclusive federal regulation may arise, also, from

the exercise of the power of Congress over interstate commerce where, in the absence of Congressional action, the states may themselves legislate. It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson* v. *Black-bird Creek Marsh Co.*, 2 Pet. 245; *California* v. *Thompson*, 313 U. S. 109, 114. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, *either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.*"

See also *Napier* v. *Atlantic Coast Line R. R. Co.*, 272 U. S. 605; *Hill et al.* v. *Florida*, 65 S. Ct. 1373 and *Southern Pacific Company* v. *Arizona*, 65 S. Ct. 1515.

Rice (Br. p. 11) and the Commission (Pet. p. 26) cite *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188, and *State* v. *Christopher*, 318 Mo. 225, 2 S. W. (2d) 621, for the proposition that not only is the Commodity Exchange Act very limited in scope but also that it does not even cover the field of futures trading. This court held in the *Dickson* case that, as to the agreement between customer and broker located in Missouri, the application of the Missouri gambling laws was supreme because, *first*, the Grain Futures Act did not purport to legalize the agreement entered into between customer and broker; *second*, because the Missouri law did not attempt to invalidate the agreement made by Uhlmann Grain Company on the floor of the exchange pursuant to the Missouri agreement (p. 193) and did "not prescribe regulations for exchanges" (p. 199)—which here the State of Illinois seeks to do by its interpretation of Section 194b. The distinction we seek to draw

is made plain by *Albers* v. *Lamson*, 380 Ill. 35, where both agreements (the one between a customer and broker and the one between brokers on the floor of the exchange) were both executed in the State of Illinois and where the court held that the Commodity Exchange Act had superseded any attempted state interference with the validity of such contracts.

Numerous other cases might be cited but we think that the foregoing are sufficient to show that since the Congress has assumed complete control of futures trading on the Board of Trade it has pre-empted and occupied that field including deliveries: state authority over its operation as a contract market has been superseded. See also *In Re Farmers Cooperative Assn.* (Supreme Court, S. D. 1943), 8 N. W. (2d) 557.

## II.

### Any Order Entered By the Commission Against the Board of Trade Would Be in Coincidence with or Repugnant to the Control of Futures Trading Now Exercised in and Under the Commodity Exchange Act.

Assuming *arguendo* that the Commodity Exchange Act is not a complete occupation of the "contract market" field by the Federal government, nevertheless any relief which could be granted on the Rice complaint would cover the same area of futures trading now occupied by the Commodity Exchange Act.

If all functions of contract markets have not been regulated by the Commodity Exchange Act, manifestly all functions relating to every aspect of futures trading have been taken over.

**A. An Order of the Commission Granting the Relief Prayed for by Rice Would Conflict With the Commodity Exchange Act.**

Paragraph 15 of the complaint (Tr. 17) alleges that the Board of Trade "has formulated and adopted rules and regulations governing its maintenance as a commercial grain exchange" and these rules and regulations should be such as to promulgate the principles of justice and equity in the purchase, sale and delivery of grain in the Chicago terminal market. In other words, Rice prays relief against the Board of Trade as a "commercial grain exchange," *i. e.*, as a contract market, a field already covered by the Commodity Exchange Act.

Again, Rice's complaint alleges that the rules and regulations of the Board of Trade are "uncertain, incomplete and ambiguous in their coverage, favor warehousemen and the sellers of grain, and discriminate against grain buyers and in many other respects are unreasonable and unsatisfactory" (Tr. 18); again indicating that Rice wishes the Commission to supervise the Board of Trade as a "commercial grain exchange."

Again (Tr. 19) Rice prays that the Commission "require said Chicago Board of Trade to adopt and submit for approval rules and regulations which are fair, equitable, adequate and specific." This again is a prayer that the Commission enlarge, duplicate or nullify the regulatory provisions of the Commodity Exchange Act in respect of the Board of Trade as a contract market.

**B. An Order of the Commission Granting Relief Under Its Interpretation of Section 194b Would Conflict With the Commodity Exchange Act.**

But Rice and the Commission here assert that this Court should not assume that the Commission would grant relief in excess of its authority, and point out that under Section 194b the Commission is given authority only to approve

or disapprove rules submitted to it by the Board of Trade "relating to the warehousing of grain."

But as above pointed out, the Board of Trade has adopted no rules and regulations with respect to warehouses save those rules and regulations above discussed which lay down the conditions on which a warehouse shall be made regular. If the Commission be held to have authority to determine what warehouses shall be considered regular or to determine the conditions under which any warehouse shall be considered regular, the Commission would thereby be given power to dictate how futures contracts shall be satisfied. The license of the Board of Trade is a contract market, is cancelable if it does not maintain futures trading (including deliveries) on the plane prescribed in the Act. To divide this responsibility between the Board of Trade and the Commission is to pronounce the Board's death sentence.

Congress has decreed that receipts from Federal warehouses shall be tenderable in satisfaction of futures contracts. Assuming power in the Commission to determine regularity, this requirement of the Congress might also be nullified. The Board of Trade would be between two masters.

**C. Private or Custodian Warehouses Are Not Involved in This Case.**

Searching to find an unoccupied area for the exercise of state jurisdiction, petitioners now here suggest for the first time that the Commission might only assume power over rules and regulations of the Board of Trade relating to private (*i.e.*, custodian) warehouses. We have above pointed out that the Board of Trade is impleaded in the Rice complaint with public warehousemen; that no rule or regulation of the Board of Trade relating to private warehouses has been mentioned in the complaint as a

basis for relief; that each rule and regulation of the Board of Trade relating to private houses has been submitted to the Commission and has been approved. The eleven Federal warehouses impleaded with the Board of Trade do not engage in private storage. It is admitted that all of the Board of Trade custodian rules and regulations have been approved by the Commission (Rice Br. p. 7).

The Commission would have granted the motion of the Board of Trade to be dismissed from the case if it had considered its authority limited to the approval or disapproval of rules and regulations relating to private houses.

**D. Three Other Theories Advanced by Petitioners to Justify an Order of the Commission Against the Board of Trade Are Unfounded.**

First: Rice states (p. 2):

> "The board was joined as a defendant to the end that the improvement sought in warehousing practices could be in part achieved through board rules and regulations (R. 10-19)."

This apparently implied that the Commission cannot improve warehousing practices in the warehouses over which it has jurisdiction in a direct proceeding against the warehouses; but that the joinder of the Board of Trade is necessary in order that some of the improvements be achieved.

Nothing could be further from the truth. If the laws of Illinois do not permit the Commission to order the improvement of hypothetical practices in a direct proceeding against the warehousemen themselves, surely the improvement of such hypothetical practices cannot be obtained in

directly by an order against the Board of Trade under Section 194b.

Furthermore, any order validly entered by the Commission against the warehousemen will be valid and binding upon the warehousemen and the public notwithstanding any rules or regulations of the Board of Trade with respect to "regularity." If the Commission enters a valid order against the state elevators which disenables them from meeting the Board of Trade's conditions of regularity, such state elevators would automatically be disqualified from regularity.

Second: It is suggested by the Commission (Com. Pet. p. 19) that it is merely seeking "to conduct the investigation which the Circuit Court of Appeals says must be restrained * * *." The Commission's brief sets forth the laws of Illinois with respect to warehouses and public utilities (p. 19) apparently to show that the Commission may conduct investigations into the affairs of public utilities. The Board of Trade is admittedly not a public utility. It admittedly operates no warehouses. The sole authority of the Commission over the Board of Trade is contained in 194b. The launching of this case against the Board of Trade cannot be justified as a mere investigation. If the Board of Trade or any other person, firm or corporation has information valuable to the Commission, this information may be obtained by subpoena in a proper case.

Third: Both Rice (p. 23) and the Commission (p. 29) have set forth in identical language four "warehouses or warehousing functions which are no part of the futures delivery mechanism" and for which, they say, the Board has adopted regulations. They contend that, since these functions are no part of the delivery mechanism, such functions are therefore not embraced in the federal control of futures trading and are therefore subject to state

regulation. An analysis of these four alleged functions is as follows:

a) "Warehousing of public grain in houses that *have not been designated as regular* for delivery of grain in satisfaction of futures contracts." (Italics theirs.)

There are no rules and regulations in any way touching on public warehouses that have not been declared regular. As above stated, the only rules and regulations of the Board of Trade having to do with public warehouses are those regulations which establish conditions precedent to regularity.

b) "Custody of grain in *private* warehouses, and control of custodian receipts." (Italics theirs.)

This case, as above explained, does not involve private warehouses and the only rules and regulations of the Board of Trade relating thereto have been approved by the Commission.

c) "Warehousing of actual grain which is not used in connection with futures trading or deliveries on futures contracts."

There are no rules and regulations of the Board of Trade relating to the public warehousing of grain not usable for delivery on futures contracts. True, not all of the grain in a regular warehouse will be tendered in satisfaction of futures contracts; but all of the grain therein is potentially usable to satisfy futures contracts. The warehouse receipts on all of the grain in such regular warehouses may be tendered in satisfaction of futures contracts. All of the grain in regular warehouses of the same grade is commingled unless special-binned or otherwise segregated. When grain is accepted for storage by a regular house it is usable for delivery in satisfaction of futures contracts and the conditions imposed by the Board on regular houses

must be conformed to until the certificate of regularity is canceled.

d) "The rates and practices under which actual grain is stored and handled by warehousemen."

There are no Board of Trade regulations with relation to the rates and practices under which actual grain is stored or handled save those rules and regulations which are conditions of regularity.

If the Commission has authority under the Illinois warehousing or public utility laws to prescribe rates and practices for warehousemen (which is the matter at issue in Nos. 470 and 472) there is nothing in the rules and regulations of the Board of Trade which hinders, prevents or in any way deters the Commission from so doing.

The foregoing analysis demonstrates, we submit, that petitioners have found no area involved in this case where the rules and regulations of the Board of Trade are unconnected with futures contracts or deliveries effectuated thereunder.

**E. Authorities.**

It is obvious and is admitted by petitioners that any order of the Commission which would conflict with the Federal enactment or the Secretary's regulations thereunder would be superseded and inoperative (*Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148). By refusing to dismiss the Board of Trade the Commission indicates that it claims authority to issue directives based on its erroneous construction of Section 194b—a construction, however, which is binding on the federal judiciary.

It is respectfully submitted that any order which the Commission might issue in pursuance of the Rice complaint would occupy the same field as that occupied by the Federal authority and would therefore be inoperative and void (*Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U. S. 456; *Hart Coal Corp. v. Sparks*, 9 F. Supp. 825). We ask leave to rely also upon the precedents cited in Nos. 470 and 472.

## III.

### Jurisdiction of the Federal District Court—the Johnson Act.

The Attorney General has adopted the Commission's petition for writ of certiorari as its brief in this case. He contends that the district court was without jurisdiction because of the Johnson Act (Com. Pet. p. 12).

The Johnson Act amendment, § 24 (1) of the Judicial Code (28 U. S. C. A., § 41 (1) ), refers to a suit to enjoin the enforcement of any order of a state administrative body or commission, or any rate-making body, or to restrain any action in compliance with any such order

> "where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

This is not applicable here because:

The suit is not based upon the ground of diversity of citizenship. It is not claimed that the assumption of jurisdiction by the Commission is repugnant to the Constitution of the United States. The order of the Commission would not affect rates chargeable by a public utility nor are there any service charges of the Board of Trade. The Board of Trade is a grain market "engaged in a business affected with a public national interest and is subject to national regulation as such" and it is not a public utility under the laws of Illinois. The order plainly interferes with interstate commerce, for the reasons set forth in Point I.

**A. It Is Not Claimed That the Assumption of Jurisdiction by the Commission Is Repugnant to the Constitution of the United States.**

We do not contend that the State statute is unconstitutional. We contend that Section 194b, as interpreted by the Commission, was superseded by the Commodity Exchange Act, and we contend, and have always contended, that the State statute as thus interpreted and applied by the Commission conflicts with the Commodity Exchange Act. This does not raise any question of the unconstitutionality of a State law or of repugnance to the Federal Constitution.

In the early case of *Sturges* v. *Crowinshield*, 17 U. S. (4 Wheaton) 122, it was contended that the mere granting of power in the 8th section of the first articles of the Constitution providing

> "The Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcy throughout the United States * * *."

operated to make the New York insolvency law invalid. Chief Justice Marshall, referring to the Federal Bankruptcy Act, said (196):

> "It has been said, that congress has exercised this power; and by doing so, has extinguished the power of the states, which cannot be revived by repealing the law of congress.
>
> "We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished; it can only be *suspended*, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of congress."

In *Cloverleaf Butter Co.* v. *Patterson*, (C. C. A. 5th Cir.) 116 F. (2d) 227, the Cloverleaf Butter Co. brought an ac-

tion against Patterson as Commissioner of Agriculture and Industries of the State of Alabama, and others, to restrain the defendants from seizing, or suspending from use, butter moving in interstate commerce into Alabama and into plaintiff's plant for renovating and processing, the claim of plaintiff was that by the congressional enactment relating to processing or renovating butter and the regulations promulgated pursuant thereto, Congress had preempted the field of manufacture of processed or renovated butter in interstate commerce, to the exclusion of the State of Alabama, its officers and agencies. The court said (230):

> "Appellees, in limine, question our jurisdiction, insisting: (1) That the attack was upon the constitutionality of a statute and the district judge as a single judge, was without jurisdiction of the case, so that no appeal lies to this court from his decision; (2) that no substantial federal question was presented and there was no federal jurisdiction, and (3) that the suit is one against the state of Alabama and as such is forbidden by the 11th Amendment.
>
> "We reject these contentions as wholly without merit. The suit was not one for three judges. It did not attack the constitutionality of the Alabama statutes, it affirmed their constitutionality. It was not a suit against the state but one within the recognized federal jurisdiction against persons purporting to act as officers of a state and, as such, to deprive citizens of rights granted them by the federal constitution and laws. Nor can it be said of it that it did not seriously present a substantial federal question. For, if appellant is right in its contention that the federal statutes and regulations have completely occupied the field, so as to exclude the state of Alabama from the exercise of its police powers, with regard to the inspection and seizure for condemnation of country and packing stock butter, the actions of defendants under purported state authority would be clearly in violation of a federal right and enjoinable as such."

This Court reversed on another point.

It thus appears that the claim of federal supersession of State law does not raise any question of repugnance to the federal constitution, as said in *Ex parte Bransford*, 310 U. S. 354, (358-359):

> "The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment."

When a state law is thus superseded, it is not unconstitutional and void: it simply does not apply to the interstate field. This clearly appears from the cases already cited, and also in the case of *Ex parte Buder*, 271 U. S. 461, where this court said (466):

> "The claim that the tax is void rests, not upon a contention that the state statute under which it was laid is unconstitutional, but upon a contention that the statute is no longer in force."

**B. The Order of the Commission in Assuming Jurisdiction Did Not Affect "Rates Chargeable by a Public Utility."**

In the first place, the Board of Trade is not and is not asserted to be a public utility. In the second place, no service charges of the Board of Trade are involved. Regulation 1620 does not involve any fees or service charges of the Board of Trade. The regulation simply states the maximum rates chargeable by a warehouse, either a state or federal, if it is to be declared regular by the Board of Trade.

**C. The Order of the Commission Plainly Interferes With Interstate Commerce.**

The Commodity Exchange Act is an exercise of the power of Congress over interstate commerce. The Commodity Exchange Act has been approved as legislation

affecting instrumentalities engaged in interstate commerce. The Board of Trade is such an instrumentality. Action by the Commission, therefore, with respect to the conduct of the Board of Trade involves interstate commerce.

The Commission, wrongly interpreting Sec. 194b, assumed jurisdiction of the rules and regulations of the Board of Trade governing "its maintenance as a commercial grain exchange" by denying the Board of Trade's motion to dismiss the Rice complaint. The assumption of jurisdiction by the Commission interferes with the administration of the Board of Trade under the Commodity Exchange Act.

The bill of complaint in the District Court alleges that the proceedings before the Commission will necessarily and unavoidably interfere with interstate commerce; that the granting of any part or portion of the relief prayed for will interfere with interstate commerce; that the granting of any part or portion of the relief prayed for will surely conflict with the Commodity Exchange Act; that the order denying the motion to dismiss in and of itself interfered with interstate commerce.

In *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456 (469-470) this Court said:

> "The Johnson Act of May 14, 1934, 48 Stat. 775, 28 U. S. C. § 41 (1), is inapplicable here because the orders of the state Commission 'interfere with interstate commerce' to the extent that they constitute an attempt to regulate matters in interstate commerce which Congress has lodged exclusively with the Federal Power Commission."

Because of the foregoing, we submit that the Johnson Act has no application.

**D. It Was Not Necessary for the Board of Trade to Exhaust State Remedies, by Appeals or Writs of Error Through the Courts of Illinois.**

It is argued by the Attorney General (Com. Pet., p. 15) that the Johnson Act inhibits a federal injunction in this case because there was "a plain, speedy and efficient remedy" to be "had at law or in equity in the courts" of the State of Illinois. In other words, the Attorney General now contends there can be no relief in the federal courts unless the party has pursued his rights throughout the state reviewing courts.

If the Attorney General is correct in this contention, there would never be any reason for seeking an injunction in the federal courts against the usurpation of power by state authorities: the party would be required to litigate his rights to the highest court of the state from which there would be direct review by this Court. In brief, the Attorney General wishes to outlaw federal injunctions against state usurpations of authority.

It is obvious that District Courts will issue injunctions when state administrative bodies are infringing upon the fields occupied by the federal government. In *Lane* v. *Wilson*, 307 U. S. 268, the court said (274-275):

> "The other preliminary objection to the maintenance of this action is likewise untenable. To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210. But the state procedure open for one in the plaintiff's situation (§ 5654) has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions

that are characteristic of administrative agencies. See Section 1 of Article IV of the Oklahoma Constitution; *Oklahoma Cotton Ginners' Assn.* v. *State*, 174 Okla. 243; 51 P. 2d 327. Barring only exceptional circumstances, see *e.g. Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, or explicit statutory requirements, *e.g.* 48 Stat. 775; 50 Stat. 738; 28 U. S. C. § 41 (1), resort to a federal court may be had without first exhausting the judicial remedies of state courts. *Bacon* v. *Rutland R. Co.*, 232 U. S. 134; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196."

## Conclusion.

The construction placed upon Section 194b by the Commission would enable the Commission to control the delivery of warehouse receipts in satisfaction of futures contracts. Such control by the Commission is coincident with or repugnant to the control over contract markets exercised by the Federal Government in and by the Commodity Exchange Act; or, more narrowly, to the control exercised by the Federal Government over futures contracts and the delivery of grain in satisfaction of futures contracts. The dismissal of the Board of Trade from the Rice case is the only order which the Commission could have entered without encroachment upon the federal field.

That the decision of the Circuit Court of Appeals should be affirmed, it is

Respectfully submitted,

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February 6, 1947.